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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LOCAL UNION NO. 1020, UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AFL-CIO,
Petitioner,

v.

TOM J. MCNAUGHTON AND DILLINGHAM CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Does the rule of decision of *DelCostello v. Teamsters*, —— U.S. ——, 103 S.Ct. 2281, decided June 8, 1983, govern suits which were pending on that date?

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OPINIONS BELOW

The original opinion of the Court of Appeals is reported at 707 F.2d 1042 and it is reproduced at pp. 1a-to 13a, *infra*. The Opinion of the Court of Appeals on petitions for rehearing is reported at 722 F.2d 1459 and it is reproduced at pp. 14a to 19a, *infra*. The opinions of the Magistrate and the United States District Court for the District of Oregon, which are not reported, are reproduced at pp. 31a to 33a and pp. 20a to 28a, *infra*, respectively.

JURISDICTION

The Court of Appeals' original opinion was rendered on June 7, 1983. Timely petitions for rehearing were denied on January 4, 1984. On March 27, 1984 Justice Rehnquist entered an Order extending the time for filing this petition to and including May 4, 1984. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves §§ 10(b) and 301 of the Labor Management Relations Act of 1947 ("LMRA"), 61 Stat. 136, 29 U.S.C. §§ 141 *et seq.*

Section 10(b) of the LMRA provides in pertinent part as follows:

> Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect * * * *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. * * *

Section 301(a) of the LMRA provides as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

A. Respondent McNaughton, an employee of respondent Dillingham (an Employer engaged in interstate commerce), covered by a collective bargaining agreement between Dillingham and petitioner Carpenters Local Union 1020, was discharged by his employer. McNaughton

brought suit under § 301 of the LMRA against Dillingham for wrongful discharge in violation of the collective agreement and against the Union for breach of the duty of fair representation in not pursuing his grievance against the discharge to arbitration after the grievance had been rejected by the Employer. The complaint was filed nine months after the Union refused to process McNaughton's grievance further, and was untimely if the claim is subject to a six-month period of limitations under the rule of decision of *DelCostello v. Teamsters*, —— U.S ——, 103 S.Ct. 2281, decided June 8, 1983. This petition is filed because the court below, contrary to the five other courts of appeals which have squarely ruled on the issue, held that *DelCostello* does not govern suits brought before *DelCostello's* decision date.

B. The complaint in this case, after reciting the identities of the parties and the existence of the collective bargaining agreement, and asserting jurisdiction under § 301 of the LMRA, set forth plaintiff McNaughton's claim as follows:

> 8. Article 3.4 (c) of the collective bargaining agreement provides that defendant Dillingham, as an employer covered by such agreement, "may discharge any employee for just and sufficient cause". The collective bargaining agreement also establishes a procedure, culminating in binding arbitration between the parties, for the presentation and disposition of complaints, disputes or grievances between the parties, including the discharge of an employee covered by such agreement.
>
> 9. Dillingham discharged plaintiff on December 12, 1980 for the alleged reason of sexual harassment by plaintiff. The alleged reason for discharge is false and unfounded in fact, which defendant Dillingham knew, or should have know[n], and does not constitute just and sufficient cause for such discharge. Plaintiff further alleges that such stated

reason was not the real reason for discharge and such real reason, not fully known to plaintiff, does not constitute just and sufficient cause for discharge.

10. Immediately after receiving notice of his discharge from employment, plaintiff protested such discharge to defendant Dillingham and to defendant Union and timely requested that defendant Union present his grievance to defendant Dillingham and pursue such grievance as his representative pursuant to the procedure provided for under the terms of the collective bargaining agreement.

11. Thereafter, defendant Union, acting as plaintiff's representative under the terms of the collective bargaining agreement, submitted plaintiff's grievance to defendant Dillingham. Thereafter, defendants met for the purpose of adjusting such grievance. On or about January 16, 1981, defendant Dillingham notified defendant Union in writing pursuant to the grievance procedure that it intended to sustain the termination of plaintiff and to refuse to rehire plaintiff.

12. Despite plaintiff's timely and due demand therefore, and in breach of its duty of fair representation owing to plaintiff by law and under the terms of the collective bargaining agreement, defendant Union arbitrarily and in bad faith failed and refused to pursue plaintiff's grievance as required by the grievance procedure set forth in the collective bargaining agreement. As a result of defendant Union's conduct as alleged, plaintiff was unable to pursue his grievance to completion according to the terms of the collective bargaining agreement and defendant Union's conduct caused such grievance to be waived without plaintiff's consent and contrary to his demands, and plaintiff was therefore denied his right to arbitration of such grievance pursuant to the terms of the collective bargaining agreement.

13. Defendants conspired with each other to permit plaintiff's discharge to stand despite the absence in fact of just and sufficient cause for such discharge,

> and defendants further conspired with each other to cause, and did in fact cause, a waiver of plaintiff's grievance, and of his arbitration rights under the procedures set forth in the collective bargaining agreement, all in bad faith and without just and sufficient cause.

Plaintiff prayed for reinstatement and back pay and such other relief as the court deemed equitable.

C. The defendants moved to dismiss the complaint as untimely filed. Magistrate Juba recommended that the motion be granted. He found:

> There is no dispute that the accrual date for this action is January 16, 1981. The complaint was filed nine months later on October 20, 1981. [P. 32a, *infra.*]

The Magistrate determined that the appropriate statute of limitation was Oregon's general commercial arbitration statute, ORS 33.310, which provides for a twenty-day limit for filing suits to vacate an arbitration award. He accordingly concluded that the complaint was time-barred, pp. 32a to 33a, *infra.* District Judge Redden agreed and dismissed the complaint against both defendants, pp. 26a to 27a, *infra.*[1]

On plaintiff's appeal, the Court of Appeals affirmed the dismissal of the claim against the Employer, but reinstated the complaint against the Union. In the Court of Appeals' view the Oregon arbitration statute of limitations was applicable only to the claim against the Employer. Adopting the views expressed by Justice Stevens in a separate opinion in *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 71-78 ("*Mitchell*"), the Court of

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[1] Before the District Judge, McNaughton asserted that his claim accrued later than January 16, 1981. In his opinion the District Judge gave him leave to "amend the complaint to allege that he did not know of, nor have reason to know of, the union's failure to proceed, until a date twenty days prior to the date on which the complaint was filed." P. 27a, *infra.* However, McNaughton did not avail himself of this opportunity.

Appeals determined that the suit against the Union should be governed by Oregon's two-year professional malpractice statute and was therefore timely.

The Court of Appeals' original opinion issued on June 7, 1983. On the following day this Court decided in *DelCostello v. Teamsters*, *supra*, that in "a suit by an employee or employees against an employer and a union, alleging that the employer had breached a provision of a collective bargaining agreement, and that the union had breached its duty of fair representation by mishandling the ensuing grievance-and-arbitration proceedings," the LMRA's "§ 10(b) should be the applicable statute of limitations governing the suit, both against the employer and against the union." 103 S.Ct. at 2285. Thereupon the Union filed a petition for rehearing, contending that on the authority of *DelCostello* the judgment dismissing the complaint against it should be affirmed. On January 4, 1984, the Court of Appeals denied that petition. In so doing the court below reaffirmed its original decision on the ground that "*DelCostello v. Teamsters* is held to be nonretroactive in its application," p. 19a, *infra*.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF FIVE OTHER COURTS OF APPEALS.

The Ninth Circuit's position that this Court's *DelCostello v. Teamsters* decision is to be given only prospective effect conflicts with the position of each of the other courts of appeals which have thus far decided the question: *Perez v. Dana Corp., Parish Frame Div.*, 718 F.2d 581 (C.A. 3); *Murray v. Branch Motor Exp. Co.*, 723 F.2d 1146 (C.A. 4); *Edwards v. Sea-Land Services, Inc.*, 720 F.2d 857 (C.A. 5); *Lincoln v. Dist. 9 of Intern. Ass'n of Machinists*, 723 F.2d 627 (C.A. 8); *Rogers v. Lockheed-Georgia Co.*, 720 F.2d 1247 (C.A. 11).

This conflict among the circuits should be resolved by the Court. The present disagreement among the lower courts with respect to the applicability of *DelCostello* in

cases pending when that case was decided is particularly inappropriate since "'[t]he need for uniformity' among procedures followed for similar claims," was one of the policies which *DelCostello* sought to advance by adopting a single nationwide six-month statute of limitations for hybrid § 301/fair representation claims (103 S.Ct. at 2294, quoting *United Parcel Services, Inc. v. Mitchell*, 451 U.S. at 70, Stewart, J. concurring). Moreover, the question presented here is one which, given the number of § 301/fair representation suits in the federal courts, is likely to arise and to have to be considered and decided in each of the other circuits unless this Court issues a definitive ruling.[2] A prompt resolution of this issue will avoid unnecessary litigation in those courts, and if we are correct in our submission on the merits, will also avoid the necessity of trying the many § 301/fair representation suits now pending in the Ninth Circuit and its district courts.[3]

The present case is an especially appropriate vehicle for resolving the intercircuit conflict. For the result of the disposition below is that plaintiff's claim is dismissed on limitations grounds against the Employer but *preserved* against the Union by the failure to apply *DelCostello*. This is squarely inconsistent with the policy of equal treatment which *DelCostello* sought to further. See 103 S.Ct. at 2293, n.19, discussed at pp. 11-12, *infra*.

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[2] On April 9, 1984, the *DelCostello* retroactivity question was argued before the Sixth Circuit, sitting *en banc*, in three cases: *Scheeler v. Glenwood Range Co., et al.*, No. 83-3139; *Fulkerson, et al. v. International Harvester Corp., et al.*, No. 82-5676; *McConnell v. Rainbow Baking Company, et al.*, No. 83-3414. The Sixth Circuit has previously applied *DelCostello* without addressing the retroactivity issue in *Curtis v. International Brotherhood of Teamsters, Etc.*, 716 F.2d 360 (C.A. 6). The Second and Seventh Circuits have followed the same course. See *Assad v. Mt. Sinai Hospital*, 725 F.2d 837 (C.A. 2); *Storck v. International Brotherhood of Teamsters, Etc.*, 712 F.2d 1194 (C.A. 7).

[3] The Ninth Circuit has reached the same result as in the instant case, in *Edwards v. Teamsters Local No. 36*, 719 F.2d 1036, *cert. den.*, 52 L.W. 3687 (Mar. 19, 1984), and in *Serina v. Gulf Trading & Transp. Co.*, 726 F.2d 560.

II. THE DECISION BELOW IS INCONSISTENT WITH THE DECISIONS OF THIS COURT.

"The general rule" recognized since *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110, "is that an appellate court must apply the law in effect at the time it renders its decision." *Thorpe v. Housing Authority*, 393 U.S. 268, 281. However, this principle is not an absolute. In *Chevron Oil Co. v. Huson*, 404 U.S. 97 ("*Chevron*") this Court set forth a three-factor test for determining when an exception from this rule should be recognized. While the court below purported to follow *Chevron*, we show briefly that its decision misapplies this Court's teachings, in large part because of a misreading of the background and bases of *DelCostello*. We begin by setting forth the passage from the *Chevron* opinion which announces the three-factor test:

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see, *e.g.*, *Hanover Shoe v. United Shoe Machinery Corp.*, [392 U.S. 481] at 496, or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, *e.g.*, *Allen v. State Board of Education*, [393 U.S. 544] at 572. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Linkletter v. Walker*, [381 U.S. 618] at 629. Finally, we have weighed the inequity imposed by retroactive application for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." *Cipriano v. City of Houma*, [395 U.S. 701] at 706. [404 U.S. at 106-107]

We consider these factors *seriatim*.

1. *DelCostello* did not overrule any prior precedent either explicitly or implicitly. The Court carefully explained why its decision therein is not inconsistent with *Auto Workers v. Hoosier Corp.*, 383 U.S. 696 ("*Hoosier*"). See 103 S.Ct. at 2289-2290. The *DelCostello* opinion noted that *Hoosier* was a "straightforward suit under § 301 of the [LMRA] for breach of a collective bargaining agreement by an employer," and that *Hoosier* had "relied heavily on the obvious and close analogy between this variety of § 301 suit and an ordinary breach of contract case" and had "expressly reserved the question whether [the Court] would apply state law to § 301 actions where the analogy was less direct or the relevant policy factors different." *Id.*, quoting 383 U.S. at 705, n.7. *DelCostello* stressed that "Justice Stewart, who wrote the Court's opinion in *Hoosier*, took this caution to heart" by arguing in his concurring opinion in *Mitchell* "that the factors that compelled adoption of state law in *Hoosier* did not apply to [hybrid § 301/fair representation suits] and that in the latter situation we should apply the federal limitations period of § 10(b)." See 103 S.Ct. at 2290.

The question whether *DelCostello* "establish[ed] a new principle of law * * * by deciding an issue of first impression whose resolution was not clearly foreshadowed" (*Chevron*, 404 U.S. at 106) is somewhat closer, due to the apparent breadth of this portion of the *Chevron* test. However, the Court has made clear that this language is to be read to apply only to situations in which a decision represents a clear break with a previously settled rule of law. *United States v. Johnson*, 457 U.S. 537, 550, n.12. See also *Hanover Shoe v. United Shoe Mach.*, 392 U.S. 481, 499. The above-quoted reminder that *Hoosier* had carefully reserved decision as to whether "other § 301 suits different from the present one might call for the application of other rules on timeliness" teaches that *DelCostello* does not constitute a "clear break" with prior

decisions, and thus does not establish "a new principle of law" within the meaning of the first *Chevron* standard.

2. Examination of the *DelCostello* opinion shows that retrospective operation will further the operation of the six-month limitation rule, and that denial of retrospective effect would retard the operation of that rule.[4]

First, the Court considered that the statutes of limitations governing suits to vacate arbitration awards in suits against employers (which *Mitchell* held, and *DelCostello* reaffirmed, see 103 S.Ct. at 2291, are the most closely analogous state statutes) are usually too *short*. *Id.* Nor would this objection be overcome by allowing the employee's suit against the union for breach of the duty of fair representation to be governed by the state malpractice statute of limitations, as the court below would have it in this case and all others brought before June 8, 1983. *DelCostello* explained that given the damage rules applicable "in the § 301 fair representation suit," if the Court were to "apply state limitations periods, a large part of the damages will remain uncollectible in almost every case unless the employee sues within the time allotted for his suit against the employer." *Id.* at 2292.

Moreover, and this is the second major policy consideration underlying *DelCostello*, utilizing the state malpractice limitations analogy would provide too *long* a time for suing unions. 103 S.Ct. at 2292-2293. This Court quoted approvingly from Justice Stewart's concurring opinion in *Mitchell*:

> "In § 10(b) of the NLRA, Congress established a limitations period attuned to what it viewed as the proper balance between the national interests in

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[4] We note that the "prior history" element of the second *Chevron* factor is inapposite in this situation because *DelCostello* did not replace any existing "prior rule" with respect to duty of fair representation claims against unions, and with respect to this type of § 301 suit against employers replaced only the relatively recent rule of *Mitchell*.

> stable bargaining relationships and finality of private settlements and an employee's interest in setting aside what he views as an unjust settlement under the collective-bargaining system. That is precisely the balance at issue in this case." [*Id.* at 2294, quoting 451 U.S. at 70]

Referring to the foregoing, the Third Circuit wrote:

> We believe that that balance is best struck if *DelCostello* is applied retroactively. Given the uncertainty that has characterized the borrowing of state statutes of limitations for *Vaca-Hines* actions, simple application of section 10(b)'s statute of limitations will serve to increase the uniformity of treatment among similar claims. Most important, the imposition of the six-month limitations period will promote the finality of grievance-arbitration decisions and prevent the belated raising of claims after years have passed. Finally, the retrospective application of section 10(b) will not undermine the goal of providing adequate opportunity for the employee to vindicate his rights, for the Court has determined in effect that six months is long enough. We thus find that the second *Chevron* factor counsels in favor of retroactivity. [*Perez, supra,* 718 F.2d at 588] [5]

Additionally, the *DelCostello* Court noted that:

> The solution proposed by Justice STEVENS [in his *Mitchell* opinion urging adoption of the malpractice analogy] also has the unfortunate effect of establishing different limitations periods for the two halves of a § 301/fair representation suit. A very similar consideration led us to reject borrowing of a state statute in *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221 (1958). See also *Vaca* [v. *Sipes*], 386 U.S. [171] at 186-188 and n. 12; *Clayton v. Automobile Workers*, 451 U.S. 679, 694-695 (1981). [103 S.Ct. 2293, n.19]

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[5] The foregoing was expressly approved by the Fifth Circuit in *Edwards v. Sea-Land Service, Inc.*, 720 F.2d at 861-862.

As this case illustrates, a refusal to apply *DelCostello* to pending cases will have "the unfortunate effect of establishing different limitations periods for the two halves of a § 301/fair representation suit". The court below has applied a twenty-day statute to the claim against the Employer and a two-year statute against the Union, with the result that the claim against the Employer is time-barred, and that against the Union survives.

In sum, the second *Chevron* factor militates strongly in favor of applying its uniform six-month rule to all pending cases.

3. Finally, *Chevron* calls for "weigh[ing] the inequity imposed by retroactive application." The court below viewed this question entirely from the perspective of the class of those plaintiffs who would be adversely affected by retroactive application of *DelCostello*, and concluded that the equities favored nonretroactivity. This approach is seriously flawed, because, as previously discussed, *DelCostello enlarges* the limitations period for many plaintiffs, who therefore benefit from retroactivity. That was the situation of Mr. DelCostello himself, see 103 S.Ct. at 2286.[6] To balance the interest of plaintiffs who would benefit from retroactivity against the interest of those who must rely on *DelCostello* to keep their actions alive, would be an unsuitable judicial task for which no standards are available. And to give retroactive effect to *DelCostello* in cases where plaintiffs would benefit thereby, but not in cases where that decision favors defendants, would be wholly unprincipled and without warrant in *Chevron* or its progeny.

Moreover, even in those cases in which the six-month statute is *shorter than that* which would apply but for *DelCostello*, the other Courts of Appeals have recognized

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[6] It is also the situation in, for example, the *McConnell* and *Storck* cases cited at p. 7, n. 2, *supra*.

that the equities do not necessarily favor the plaintiff.[7] Certainly once *Mitchell* was decided, and carefully reserved the limitations issue with respect to claims against unions (451 U.S. at 60, n.2), no potential plaintiff could confidently wait for more than six months after the claim accrued even if he intended to sue only the union. In those States whose arbitration statute provides for a limitations period of less than six months, any employee who failed to file suit within that shorter period slept on his rights at least against the employer. A holding that *DelCostello* is nonretroactive would leave the union as the sole defendant because the plaintiff failed to make a timely claim against the employer. That is precisely this case. If Mr. McNaughton had filed his suit within six months after his claim accrued (that is by July 16, 1981, see p. 5 *supra*), his claim would have been timely against *both* defendants under *DelCostello* and he would presumably be arguing in favor of full retroactivity. But because he waited nine months to sue he has placed the Union in a *worse* position than if he had not slept on his rights against the Employer. In such a case a holding that *DelCostello* is nonretroactive is inequitable even if only the respective rights of the plaintiff and the Union are considered.

In sum, we submit that each of the *Chevron* factors favors the retroactivity of *DelCostello*, and that the five other circuits which have decided this question correctly hold that *DelCostello* should be applied to cases pending when that case was decided.

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[7] See *Perez*, 718 F.2d at 588; *Murray*, 723 F.2d at 1148; *Edwards*, 720 F.2d at 862; *Lincoln*, 723 F.2d at 630; and *Rogers*, 720 F.2d at 1250.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

No. 82-3211

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

TOM J. MCNAUGHTON,
Plaintiff-Appellant,

v.

DILLINGHAM CORPORATION, a Hawaii Corporation, doing business as Dillingham Ship Repair, Portland, Oregon; and LOCAL #1020 OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,
Defendants-Appellees.

Argued and Submitted Jan. 5, 1983

Decided June 7, 1983

Paul J. Kelly, Jr., Glasgow, Labarre & Kelly, Portland, Or., for plaintiff-appellant.

Wayne D. Landsverk, Newcomb, Sabin, Meyer & Schwartz, David Cash, Doblie, Francesconi & Welch, Portland, Or., for defendants-appellees.

Appeal from United States District Court
for the District of Oregon

Before WALLACE and SCHROEDER, Circuit Judges, and COYLE,* District Judge.

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* Honorable Robert E. Coyle, United States District Judge for the Eastern District of California, sitting by designation.

COYLE, District Judge:

This is an action brought by a union member under § 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185 against both his former employer, Dillingham Corporation, and his local union. On December 12, 1980, defendant Dillingham discharged plaintiff for alleged sexual harassment of another employee. Plaintiff protested his discharge to his union. Subsequently, the Local, acting as plaintiff's representative, submitted plaintiff's grievance to Dillingham. Representatives of the union and the employer met for the purpose of adjusting plaintiff's grievance. On or about January 16, 1981, Dillingham notified the Local in writing that it intended to sustain its discharge. The Local declined to pursue plaintiff's grievance any further.

In his complaint, plaintiff alleged that defendant Dillingham wrongfully discharged plaintiff. Plaintiff also claimed that his local union breached its duty of fair representation by refusing to press plaintiff's grievance through the grievance procedures provided by the collective bargaining agreement.

This action was commenced in the district court on October 20, 1981, nine months after his alleged wrongful discharge. Both the Local and Dillingham raised the statute of limitations as a defense to the action. In its motion to dismiss, Dillingham argued that either the six-month limitation period for bringing an unfair labor practice claim pursuant to Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) or Oregon's twenty-day limitations period for filing exceptions to arbitration awards, Or. Rev. Stat. § 33.310 (1981), barred plaintiff's claim against his former employer. Plaintiff argued that the appropriate statute of limitations was either Oregon's two-year limitation on tort actions or its six-year limitation on actions upon contract or upon liabilities created by statute. On March 16, 1982,

the district court dismissed plaintiff's action against both the employer and the union as time-barred under Or.Rev. Stat. § 33.310.

1. *Plaintiff's Claim Against Dillingham.*

First, we will address whether plaintiff's claim against Dillingham is barred by Oregon's twenty-day statute of limitations. In light of the absence of an express statute of limitations for suits brought under § 301 of the LMRA, the timeliness of such actions is determined by reference to the appropriate state statute of limitations. *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 60, 101 S.Ct. 1559, 1562-63, 67 L.Ed.2d 732, 738-39 (1981); *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 704-05, 86 S.Ct. 1107, 1112-13, 16 L.Ed.2d 192, 199 (1966). It is the duty of the federal court to characterize the action, without reference to state law, and then to apply the appropriate state statute of limitations. *Washington v. Northland Marine Co., Inc.*, 681 F.2d 582, 584 (9th Cir. 1982); *Christianson v. Pioneer Sand & Gravel Co.*, 681 F.2d 577, 581 (9th Cir. 1982).

Relying upon *Mitchell, supra*, and *Local 1020, United Brotherhood of Carpenters & Joiners v. FMC Corp.*, 658 F.2d 1285 (9th Cir. 1981), the district court characterized plaintiff's suit as an action to vacate an arbitration award and applied Or. Rev. Stat. § 33.310 as the most appropriate statute of limitations.

We agree with the district court's analysis as it applies to the employer. In *Mitchell*, an employee filed a complaint against his union and former employer under § 301(a) of LMRA seventeen months after a joint grievance panel of union and company representatives upheld his discharge. The Supreme Court held that the appropriate statute of limitations on Mitchell's suit against the employer was New York's 90-day limit on applications to vacate an arbitration award rather than New York's six-year limitation for breach of contract actions.

The Court's decision emphasized the need for relatively rapid and certain resolution of labor disputes.

> We said in *Hoosier Cardinal* that one of the leading federal policies in this area is the 'relatively rapid disposition of labor disputes.' 383 U.S., at 707 [86 S.Ct. at 1114]. Cf. 29 U.S.C. § 160(b) (6-month period under NLRA). This policy was one of the reasons the Court in *Hoosier Cardinal* chose the generally shorter period for actions based on an oral contract rather than that for actions upon a written contract, 383 U.S., at 707 [86 S.Ct. at 1114], and similar analysis supports our adoption of the shorter period for actions to vacate an arbitration award in this case.
>
> . . . Although the present case involves a fairly mundane and discrete wrongful-discharge complaint, the grievance and arbitration procedure often processes disputes involving interpretation of critical terms in the collective-bargaining agreement affecting the entire relationship between company and union. *See, e.g., Humphrey v. Moore*, 375 U.S. 335, 84 S.Ct. 363, 11 L.Ed.2d 370, *supra*, (seniority rights of all employees). This system, with its heavy emphasis on grievance, arbitration, and the 'law of the shop,' could easily become unworkable if a decision which has given 'meaning and content' to the terms of an agreement, and even affected subsequent modifications of the agreement, could suddenly be called into question as much as six years later.

451 U.S. at 63-64, 101 S.Ct. at 1564, 67 L.Ed.2d at 740-41 (footnote omitted).

Local 1020 was an appeal from a district court's dismissal of § 301 suit to overturn an arbitrator's award in a jurisdictional dispute between a union and employer. The union filed the complaint five months after the date of the arbitrator's award. 658 F.2d at 1287. After con-

sidering several possible statutes of limitations including Oregon's six-year limitation for an action on a contract, the court selected Oregon's twenty-day limitation for filing exceptions to an arbitration award as the most appropriate statute of limitations.[1] *Id.* at 1289-90.

According to plaintiff, the absence of an arbitration award in the instant case distinguishes it from both *Mitchell* and *Local 1020*. Plaintiff argues that this suit cannot be characterized as an action to vacate an arbitration award because unlike an arbitration award, a decision by the Local not to take his grievance to arbitration is not final and binding.

Plaintiff relies heavily on this court's recent decision in *Christianson v. Pioneer Sand & Gravel Co.*, 681 F.2d 577 (9th Cir. 1982) to support this distinction. In that case, union members brought a § 301 action against both their local union and former employer, alleging that the employer violated seniority provisions of the applicable collective bargaining agreement and that the union breached its duty of fair representation by failing to press plaintiff's complaints through the grievance and arbitration procedures established by the collective bargaining agreement. The suit was commenced almost six years after the employer's actions of which plaintiffs complained. *Id.* at 578. A panel of this circuit affirmed the district court's ruling that the appropriate statute of limitations on the employee's suit against their former employer was Washington's three-year limitation for actions upon an oral contract rather than Washington's six-year limitation for actions on written contracts.

The portion of the *Christianson* opinion upon which plaintiff places particular reliance is a discussion of a

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[1] The court's selection of Or.Rev. Stat. § 33.310 can be read as either dicta or an alternative holding. The court affirmed the lower court's dismissal of the action on the basis that the union failed to state a claim on which any relief can be granted. 658 F.2d at 1295-96.

preliminary matter unrelated to the statute of limitations question. The threshold issue in the case was whether the dismissal of appellants' claim against the union from which appellants did not appeal precluded them from recovering against their former employer. *Id.* at 579. In *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 96 S.Ct. 1048, 47 L.Ed.2d 231 (1978) and *Mitchell*, the Supreme Court stated that a plaintiff must prove a breach of the union's duty of fair representation in order to prevail against either the company or union in a § 301 action.

The *Christianson* court's conclusion that appellants could recover from their former employer was based upon a distinction it saw between these Supreme Court precedents and the case before it:

> Even if Justice Stewart's contention that an employee must prevail on his claim against his union before he can reach the issue involving his employer constitutes a correct statement of the majority's holding in *Mitchell* that concept is inapplicable here. Both *Mitchell* and *Hines* were suits to vacate arbitration awards. When an arbitration decision has been rendered, the interest in finality of that decision is sufficiently strong to warrant clear evidence of a breach of a union's duty of fair representation before the courts should overturn the arbitration award. In the present case, however, the arbitration process was never reached; in fact, the Union never even processed appellant's grievances. Therefore, the concept of finality, which controlled in *Hines* and *Mitchell*, is totally inapposite here.
>
> Absent the special consideration of preserving the finality of arbitration, that was present in *Mitchell*, we hesitate to apply Justice Stewart's suggestion that an employee must prevail against his union in order to make his claim against the employer for breach of a collective bargaining agreement. The

> respective breaches of duty by the union and the employer often may be wholly unrelated, and we see no reason why an employee's failure to prevail upon his claim of breach by one of the two should preclude recovery from the other. *See Vaca v. Sipes*, 386 U.S. 171, 195-98, 87 S.Ct. 903, 919-921, 17 L.Ed.2d 842 (1967); *Czosek v. O'Mara*, 397 U.S. 25, 29, 90 S.Ct. 770, 773, 25 L.Ed.2d 21 (1970). Such a rule would prove especially harsh where, as here, the employee has lost one of his claims, not on the merits, but on the basis of a statute of limitations.

681 F.2d at 579-80.

We are not persuaded that this language supports plaintiff's position that his suit against Dillingham should be characterized as a tort or contract action rather than an action to vacate an arbitration award. The *Christianson* court's conclusion that the absence of an arbitration award rendered the Supreme Court's concern regarding the finality of arbitration inapposite was made in the context of deciding whether an employee must prevail against his union in order to bring an action against the employer for breach of a collective bargaining agreement. Here, we are asked to decide what the proper characterization for plaintiff's action is against Dillingham and to apply the most analogous state statute of limitations. *Christianson* is distinguishable from the instant case because no state statute of limitations to vacate an arbitration award was in issue. Although the state of Washington has a 90-day arbitration statute of limitations, Wash. Rev.Code § 7.04.180 (1961), the defendant in *Christianson* had no need to raise it since the claim was barred by a three-year statute of limitations. Moreover, the district court decided *Christianson* prior to the Supreme Court's decision in *Mitchell*.

We reach the same conclusion as other circuits that have considered this question; there is no reason why a different statute of limitations should apply to an action

involving a grievance which the union and employer disposed of without arbitration than to an action involving an arbitrated grievance. *Hall v. Printing and Graphic Arts Union, Local #3*, 696 F.2d 494 (7th Cir. 1982); *Badon v. General Motors Corp.*, 679 F.2d 93 (6th Cir. 1982). In both instances, the aggrieved employee may challenge the employer's action by availing himself of the grievance procedure established by the collective bargaining agreement. The disposition of the employee's grievance becomes final at whatever stage of the grievance procedure the union and employer resolve the grievance or terminate further consideration of it.[2] See *UMW v. Barnes & Tucker Co.*, 561 F.2d 1093, 1096 (3d Cir. 1977) ("It is not arbitrator per se that federal policy favors but rather final adjustment of differences by a means selected by the parties.") McNaughton's present action against Dillingham is analogous in nature to one to vacate an arbitration award because he is "attempting to resurrect a grievance previously laid to rest." *Hall, supra*, 696 F.2d at 497.

A contrary ruling would be inconsistent with the policy of rapid disposition of labor disputes. It would be anomalous to apply a twenty-day statute of limitations when an employee's grievance was arbitrated and a two or six-year statute of limitations when a union pursued a grievance, but disposed of it without reaching arbitration. Arbitration is the last stage in the grievance process. Federal labor policy favors settlement of grievances before this final stage. See *Vaca v. Sipes*, 386 U.S. 171, 191, 87 S.Ct. 903, 917, 17 L.Ed.2d 842, 858 (1967). An employer would be reluctant to settle a grievance early on, if by doing so, it was subjecting itself to a lawsuit as much as six years down the road for which it could be

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[2] This includes the situation where a union member submits a grievance to the union, and the union fails to process the grievance.

held liable for back wages.[3] "This would greatly increase the cost of the grievance machinery and could so overburden the arbitration process as to prevent it from functioning successfully." *Id.* at 192, 87 S.Ct. at 917-18, 17 L.Ed.2d at 858-59.

Although the twenty-day limitation provided by Or. Rev.Stat. § 33.310 is a short period of time in which to file a § 301 suit against an employer, we cannot say that it is so short that "it unduly qualifies or diminishes the federal right the cause of action seeks to protect." *San Diego County Dist. Council v. Cory*, 685 F.2d 1137, 1139 (9th Cir. 1982). We agree with the district court that the twenty-day period does not begin to run until the plaintiff knows or had reason to know that his union had disposed of or was no longer pursuing his grievance.[4]

We conclude that the district court correctly dismissed plaintiff's action against Dillingham as time-barred under Or.Rev.Stat. § 33.310.[5]

II. *Plaintiff's Claim Against the Local*

The district court assumed that the twenty-day limitation of Or.Rev.Stat. § 33.310 barred McNaughton's action

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[3] If an employee prevails against his employer in a wrongful discharge action and against his union in an action for breach of duty of fair representation, damages are apportioned between the two defendants. *Bowen v. United States Postal Service*, —— U.S. ——, 103 S.Ct. 588, 74 L.Ed.2d 402 (1983).

[4] The district court granted plaintiff thirty days to amend his complaint to allege that he neither knew of, nor had reason to know of, the union's failure to pursue his grievance, until twenty days prior to the date on which the complaint was filed. Plaintiff did not amend his complaint.

[5] We do not find this an appropriate case to address Dillingham's suggestion that the court apply the sixth month limitation period under Section 10(b) of the NLRA.

We also decline to address plaintiff's argument that *Mitchell* should not be applied retroactively because plaintiff did not raise this argument to the court below.

against the union for breach of its duty of fair representation. Plaintiff urges us to apply either Or.Rev.Stat. 12.110 which imposes a two-year limitation on professional malpractice actions or Or.Rev.Stat. 12.080(1) which imposes a six-year limitation on actions upon a contract or liability. Defendant Local argues that plaintiff's claim against it is analogous to a suit to vacate an arbitration award and that the same statute of limitations should apply to the union as to the employer for the sake of uniformity.

In *Mitchell*, the employer petitioned for review of the court of appeals' decision, but the union did not do so. Therefore, *Mitchell* did not resolve the question against a union of how an action for unfair representation should be characterized.[6] Justice Stevens, who concurred in part and dissented in part, believed that the claim against the union for unfair representation may not be "characterized as an action to vacate an arbitration award." 451

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[6] The Court stated: "We are called upon in this case to determine which state statute of limitations period should be borrowed and applied to an employee's action against his *employer* under § 301(a) of the Labor Management Relations Act . . . ." 451 U.S. at 58, 101 S.Ct. at 1559, 1561, 67 L.Ed.2d at 737 (emphasis added).

In *Singer v. Flying Tiger Line, Inc.*, 652 F.2d 1349 (9th Cir. 1981), a panel of this circuit believed that the rule in *Mitchell* extended to suits against the union:

> In the future, as *Mitchell* requires when the action is commenced after an unfavorable arbitral decision, we shall treat suits against a union for breach of the duty of fair representation and against an employer for a breach of collective bargaining agreement under [a limitations statute for vacating arbitration awards].

Id. at 1353.

The court, however, declined to apply *Mitchell* retroactively. *Id.* The court's belief that *Mitchell's* holding applied to actions against a union for unfair representation apparently was based on an erroneous assumption that the union as well as the employer had appealed from the ruling of the court of appeals. *See id.* We now correct this error.

U.S. at 73, 101 S.Ct. at 1569, 67 L.Ed.2d at 746-47. We agree with his analysis:

> The arbitration proceeding did not, and indeed, could not, resolve the employee's claim against the union. Although the union was a party to the arbitration, it acted only as the employee's representative; the Joint Panel did not address or resolve any dispute between the employee and the union. Therefore, with respect to the employee's action against the union, the finality and certainty of arbitration are not threatened by the prospect that the employee might prevail on his judicial claim. Because no arbitrator has decided the primary issue presented by this claim, no arbitration award need be undone, even if the employee ultimately prevails.
>
> The employee's claim against his union is properly characterized not as an action to vacate an arbitration award, but rather as a malpractice claim. There is no conceptual reason why that claim may not survive even if the employer is able to rely on the arbitration award as a conclusive determination of its obligations under the collective-bargaining agreement. Thus, by analogy, a lawyer who negligently allows the statute of limitations to run on his client's valid claim may be liable to his client even though the original defendant no longer has any exposure.

Id. 451 U.S. at 73-74, 101 S.Ct. at 1569-70, 67 L.Ed.2d at 747 (citation and footnotes omitted).

Accordingly, we hold that the Oregon statute of limitations for filing exceptions to an arbitration award does not apply to plaintiff's action against the Local.[7]

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[7] Several other circuits have characterized an action against a union for a breach of the duty of fair representation as a tort malpractice claim. *Newton v. Local 801*, 684 F.2d 401, 403 (6th Cir. 1982) (applying six-year statutory liability limitations statute);

Our holding in no way undermines the finality and certainty of arbitration awards which *Mitchell* sought to protect. An arbitration award or non-arbitrated settlement of a grievance is not affected by an employee's successful action against his union. To undo the arbitration award or settlement, the employee still would have to prevail on his claim against the employer for breach of the collective bargaining agreement. Moreover, as Justice Stevens pointed out, it is possible for a union to breach its duty of fair representation without an employer violating the collective bargaining agreement. 451 U.S. at 73 n.4, 101 S.Ct. at 1569 n.4, 67 L.Ed.2d at 747 n.4.

Our decision here is consonant with this circuit's recent decision in *Washington v. Northland Marine Co., Inc.*, 681 F.2d 582 (9th Cir. 1982). In that case, the court applied Washington's three-year tort limitations period to a duty-of-fair-representation claim rather than Washington's two-year "catch-all" statute of limitations. The court did remark that "application of the three-year statute of limitations will promote uniformity in the limitations period applicable against unions and employers" because in *Christianson* decided the same day, it had applied Washington's three-year statute of limitations for oral contracts to a § 301 suit against an employer. 681 F.2d at 586-87. Uniformity, however, was only an incidental benefit, and not a critical factor to the court holding. We reject the Local's argument that the same

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Edwards v. Sea-Land Service, Inc., 678 F.2d 1276, 1292 (5th Cir. 1982) (applying two-year statute of limitations on tort actions); *Flowers v. Local 2602 of United Steel Workers*, 671 F.2d 87, 91 (2d Cir.), *cert. granted subnom. Del Costello v. Int'l. Brotherhood of Teamsters*, —— U.S. ——, 103 S.Ct. 442, 74 L.Ed.2d 599 (1982) (applying three-year statute of limitations for malpractice actions).

The Seventh Circuit has adopted the sixth month limitations rule of Section 10(b) of the National Labor Relations Act. *Hall v. Printing & Graphic Arts Union, Local #2*, 696 F.2d 494, 498-99 (7th Cir. 1982).

statute of limitations should apply to plaintiff's claims against the union and the employer. "[U]niformity of limitations periods, although desirable, is not the dominant consideration in selecting the appropriate statute of limitations. Rather, characterization of the claim is the touchstone. . . ." *Christianson*, 681 F.2d at 579 n.1.

We conclude, therefore, that Or.Rev.Stat. § 12.110, Oregon's two-year professional malpractice statute, applies to McNaughton's claim against the Local for breach of its duty of fair representation. This would make the action against the union timely commenced.

For the reasons stated herein, the district court's dismissal of plaintiff's action against Dillingham is affirmed and the dismissal of the action against the Local is reversed.

APPENDIX B

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 82-3211

TOM J. MCNAUGHTON,
Plaintiff-Appellant,

v.

DILLINGHAM CORPORATION, a Hawaii Corporation, doing business as DILLINGHAM SHIP REPAIR, PORTLAND, OREGON; and LOCAL *#1020* of the UNITED BROTHERHOOD of CARPENTERS and JOINERS of AMERICA, AFL-CIO,
Defendants-Appellees.

Argued and Submitted Jan. 5. 1983

Decided Jan. 4, 1984

Paul J. Kelley, Jr., Glasgow, Labarre & Kelly, Portland, Or., for plaintiff-appellant.

Wayne D. Landsverk, Newcomb, Sabin, Meyer & Schwartz, David Cash, Doblie, Francesconi & Welch, Portland, Or., for defendants-appellees.

Appeal from United States District Court
for the District of Oregon

Before WALLACE and SCHROEDER, Circuit Judges, and COYLE,* District Judge.

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* Honorable Robert E. Coyle, United States District Judge for the Eastern District of California, sitting by designation.

COYLE, District Judge.

In *McNaughton v. Dillingham Corporation, et al.*, 707 F.2d 1042 (9th Cir. 1983), we upheld the application of Oregon's twenty-day limitation period for filing exceptions to arbitration awards, Or.Rev.Stat. § 33.310 (1981), to bar plaintiff's claim against his employer, Dillingham Corporation, brought under § 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185. We further found this was not to be an appropriate case to address Dillingham's suggestion that the court apply the six-month limitation period under Section 10(b) of the National Labor Relations Act (NLRA), 29 U.S.C. § 160(b). We reversed the District Court's application of Oregon's twenty-day limitation period for filing exceptions to arbitration awards to plaintiff's claim against Local 1020 brought under § 301 of the LMRA. We did so in agreement with Justice Stevens' opinion in *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 73, 101 S.Ct. 1559, 1569, 67 L.Ed.2d 732 (1981), that the most appropriate state statute of limitations to apply to actions by a union member against his local union for breach of its duty of fair representation is Oregon's two-year limitation on professional malpractice actions. Or.Rev.Stat. § 12.110.

In *Del Costello v. Teamsters*, —— U.S. ——, 108 S.Ct. 2281, 76 L.Ed.2d 476 (1983), the United States Supreme Court held that the proper statute of limitations to apply to a suit by an employee against an employer for breach of a collective bargaining agreement and against a union for breach of its duty of fair representation is the six-month limitations period in § 10(b) of the NLRA rather than any state statutes of limitations.

Because of the decision in *Del Costello*, both plaintiff and the union have filed Petitions for Rehearing. Plaintiff argues that *Del Costello*, while directly on point, should not be given retrospective effect. The union, of course, argues that *Del Costello* does apply although it

does not specially address the issue of retrospective application.

Thus, the primary issue facing us as a result of the decision in *Del Costello* is whether *Del Costello* should be given retrospective application. As explained in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07, 92 S.Ct. 349, 355-356, 30 L.Ed.2d 296, 306 (1971), this determination is dependent upon consideration of three separate factors:

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants must have relied, . . . , or by deciding an issue of first impression whose resolution was not clearly foreshadowed. . . . Second, it has been stressed that 'we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' . . . Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of nonretroactivity.' . . .

Accord Wiltshire v. Standard Oil Co., 652 F.2d 837, 840 (9th Cir. 1981), *cert. denied*, 455 U.S. 1034, 102 S.Ct. 1737, 72 L.Ed.2d 153 (1982); *Singer v. Flying Tiger Line Inc.*, 652 F.2d 1349, 1358 (9th Cir. 1981).

In making the analysis the most important factor is the first one, *see Singer v. Flying Tiger Line, Inc.*, 652 F.2d at 1353. The Second, Fifth, Sixth and Ninth Circuits had characterized an action against a union for breach of the duty of fair representation as a tort or malpractice claim, *McNaughton v. Dillingham Corpora-*

tion, 707 F.2d 1042 (9th Cir. 1983); *Flowers v. Local 2602 of United Steel Workers*, 671 F.2d 87, 91 (2d Cir. 1982), reversed *sub. nom. Del Costello v. Teamsters*, —— U.S. ——, 103 S.Ct. 2281, 76 L.Ed.2d 476; *Newton v. Local 801*, 684 F.2d 401, 403 (6th Cir. 1982); *Edwards v. Sea-Land Services, Inc.*, 678 F.2d 1276, 1292 (5th Cir. 1982) while the Seventh Circuit had adopted § 10(b) as the appropriate limitation period. *Hall v. Printing & Graphic Arts Union, Local #3*, 696 F.2d 494, 498-99 (7th Cir. 1982). Although there are decisions holding that there can be no justifiable reliance or local precedent where there are conflicting decisions in the circuits. *United States v. Serfass*, 492 F.2d 385, 395 (3d Cir. 1974), *aff'd*, 420 U.S. 377, 95 S.Ct. 1055, 43 L.Ed.2d 265 (1975); *Dasho v. Susquehanna Corp.*, 461 F.2d 11, 21 (7th Cir. 1972), *cert. denied*, 408 U.S. 925, 92 S.Ct. 2496, 33 L.Ed.2d 336 (1972), we have held that a single decision in another circuit does "not clearly foreshadow" a Supreme Court decision. *Wiltshire v. Standard Oil Co.*, 652 F.2d at 841; *see also Kennard v. United Parcel Service, Inc.*, 531 F.Supp. 1139, 1146 n.16 (E.D.Mich. 1982). It is true that the Supreme Court in *Mitchell* specifically refrained from addressing the contention that it should borrow § 10(b) of the NLRA and it did not address what state statute should apply against the union. However, it is difficult to state that plaintiff should have anticipated that the Supreme Court would borrow a federal statute of limitations. Even the Supreme Court in *Del Costello* notes that such a procedure is unusual. —— U.S. at ——, ——, 103 S.Ct. at 2287, 2293-2294, 76 L.Ed.2d at 485, 493.

Looking to the second and third factors set forth in *Huson*, it is arguable that retrospective application of *Del Costello* will further the purpose of the rule set forth in *Del Costello*. The Supreme Court did not substantially undermine the concern expressed in the majority opinion in *Mitchell* that brevity is of critical importance in resolv-

ing disputes arising out of a breach of a collective bargaining agreement and further noted that fairly rapid resolution of a dispute arising out of a breach of a duty of fair representation is desirable. —— U.S. at ——, 103 S.Ct. at 2291-2292, 76 L.Ed.2d at 490-91. However, in *Huson*, which held that a shorter limitations period than had been applied by the Fifth Circuit was appropriate, the Supreme Court analyzed the second criterion:

> To hold that the respondent's lawsuit is retroactively time barred would be anomalous indeed. A primary purpose underlying the absorption of state law as federal law in the Lands Act was to aid injured employees by affording them comprehensive and familiar remedies . . . yet retroactive application of the Louisiana statute of limitations to this case would deprive the respondent of any remedy whatsoever on the basis of superceding legal doctrine that was quite unforeseeable. To abruptly terminate this lawsuit that has proceeded through lengthy and, no doubt, costly discovery stages for a year would surely be inimical to the beneficent purpose of Congress. [404 U.S. at 107-08, 92 S.Ct. at 356, 30 L.Ed.2d at 306].

Here, we are faced with somewhat a similar situation. To hold *Del Costello* retroactive would cut off any remedy plaintiff may have in this matter. Although the case in the district court had not proceeded beyond the motion to dismiss state, plaintiff's complaint was brought only three months past the limitations date approved in *Del Costello*. Thus, while plaintiff relied on a much longer limitation period when filing his action, he did not unduly prolong the filing of this action. Furthermore, courts have been reluctant to retrospectively apply a decision imposing a shorter limitations period, *Chevron Oil v. Huson; Wiltshire v. Standard Oil Co.; Singer v. Flying Tiger Line*. Finally, as *Huson* noted in its discussion of third factor, plaintiff here did not sit on his rights. To cut off his remedy because it was filed three months too

late seems inequitable even given the Supreme Court's expressed interest that these matters be resolved quickly. The three month delay in this case cannot be seen to undermine the relatively rapid dissolution of labor disputes favored by federal law.

Accordingly, for the reasons set forth herein, *Del Costello v. Teamsters*, is held to be nonretroactive in its application, our decision in *McNaughton v. Dillingham Corporation*, 707 F.2d 1042 (9th Cir. 1983) is affirmed and the petitions for rehearing are denied.[1]

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[1] Recently, in *Edwards* v. *Teamsters Local Union No. 36*, 719 F.2d 1036 (9th Cir. 1983), we held *Del Costello* nonretroactive in a case involving the appropriate statute of limitations under California law to apply in a suit against the union for breach of the duty of fair representation.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 81-985

MARTIN GERBA,
Plaintiff,

v.

GILMORE STEEL CORPORATION, a corporation, dba OREGON STEEL MILLS, INC., a corporation and THE UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Defendants.

Civil No. 81-972

TOM J. MCNAUGHTON,
Plaintiff,

v.

DILLINGHAM CORPORATION, an Hawaii corporation, doing business as Dillingham Ship Repair, Portland, Oregon; and LOCAL #1020 of the UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,
Defendants.

OPINION

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OPINION

[Filed Mar. 1, 1982]

REDDEN, Judge:

These cases have been consolidated for consideration of the motions to dismiss under Fed. R. Civ. P. 12(b).

Gerba is an action which I dismissed with leave to re-file within thirty days. *McNaughton* is a case presenting Objections to the Findings and Recommendations of Judge Juba, who dismissed on the authority of *Gerba*. Both actions are brought by an employee against his union for breach of the duty of fair representation and against the employer for wrongful discharge. The cases present an identical issue of law: what is the appropriate limitations period, in Oregon, for suits brought pursuant to § 301 of the Labor Management Relations Act, 29 U.S.C. § 185?

I approve Judge Juba's Findings in *McNaughton* and deny defendants' motion to dismiss in *Gerba*.

The Supreme Court addressed the issue of the proper statute of limitations in § 301 actions most recently in *United Parcel Service v. Mitchell*, —— U.S. ——, 101 S.Ct. 1559 (1981). There, the employee, who had been discharged for alleged dishonest acts, denied the allegations and requested representation by his union in the grievance process. His grievance was submitted to and rejected by a panel of union and management representatives, equal in number, who upheld the discharge. Seventeen months later the employee filed against both his union and employer under § 301, 101 S.Ct. 1561-1562. Congress has not provided a statute of limitations for suits brought pursuant to § 301 and the limitations period is determined by reference to "the most appropriate" statute of limitations provided by state law. *United Auto Workers v. Hoosier Cardinal*, 383 U.S. 696, 704-705; 86 S.Ct. 1107, 1112-113 (1976); *Mitchell*, 101 S.Ct. 1652-3.

In *Mitchell*, the employee argued that the most appropriate statute was the six year New York statute for actions based on contract, and therefore his action was timely filed. The Supreme Court held that the "most appropriate" limitations period was the 90 day period provided by New York law for the bringing of an action to vacate an arbitration award. 101 S.Ct. 1563-5. The Su-

preme Court reached this decision as a result of its analysis of the need for relatively rapid and certain resolution of employment disputes and the advantages it felt were inherent in the grievance process:

> We think that the unfair representation claim made by an employee against his union, even though his employer may ultimately be called upon to respond in damages for it if he is successful, is more a creature of 'labor law' as it has developed since the enactment of § 301 than it is of general contract law. We said in *Hoosier Cardinal* that one of the leading federal policies in this area is the 'relatively rapid disposition of labor disputes.' 383 U.S., at 707, 86 S.Ct., at 1114. Cf. 29 U.S.C. § 160(b) (1976) (6-month period under NLRA). This policy was one of the reasons the Court in *Hoosier Cardinal* chose the generally shorter period for actions based on an oral contract rather than that for actions upon a written contract, *ibid.*, and similar analysis supports our adoption of the shorter period for actions to vacate an arbitration award in this case.
>
> It is important to bear in mind the observations made in the *Steelworkers Trilogy* that '[t]he grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. . . . The processing machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.' *United Steelworkers v. Warrier & Gulf Navigation Co.*, 363 U.S. 574, 578, 80 S.Ct., 1347, 1350, 4 L.Ed.2d 1409 (1960). Although the present case involves a fairly mundane and discrete wrongful discharge complaint, the grievance and arbitration procedure often processes disputes involving interpretation of critical terms in the collective-bargaining agreement affecting the entire relationship between company and union. *See e.g., Humphrey v. Moore*, 375 U.S. 335, 84

> S.Ct. 363, 11 L.Ed.2d 370 (seniority rights of all employees). This system, with its heavy emphasis on grievance, arbitration, and the 'law of the shop," could easily become unworkable if a decision which has given 'meaning and content' to the terms of an agreement, and even affected subsequent modifications of the agreement, could suddenly be called into question as much as six years later.

101 S.Ct. 1564.

The *Mitchell* decision was applied in *Local 1020 v. FMC*, —— F.2d ——, No. 78-3212, slip op. p. 5090 (9th Cir. Oct. 13, 1981). *Local 1020* was an appeal from the District of Oregon in a § 301 suit to overturn an arbitrator's award in a jurisdictional dispute between union and employer. The complaint was filed five months after the date of the arbitrator's award, *Id.* at 5091. Judge Belloni dismissed the complaint as untimely, and the Ninth Circuit affirmed. *Id.* at 5091. The Ninth Circuit held that the "most appropriate" Oregon statute of limitations was the 20 day limit provided by Oregon law for suits brought to vacate an arbitration award, ORS 33.310, *Id.* at 5094.

The Ninth Circuit chose the 20 day period in preference to other, longer Oregon statutes of limitations, and in preference to the 90 days limit provided by the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* The Ninth Circuit made this choice as a result of its analysis of *Mitchell* and other Supreme Court precedents.

I applied *Local 1020* two months later, in *Gerba v. Oregon Steel Mills,* Civ. No. 81-985 (dec. filed Dec. 21, 1981). *Gerba* was an action brought under § 301 by an employee against his union and employer, alleging breach of the duty of fair representation and wrongful discharge. Its facts were analagous to those in *Mitchell.* The complaint in *Gerba* was filed October 23, 1981 and disclosed that the action arose from a grievance process concluded on May 29, 1981, when the union "accepted Oregon Steel's three step grievance answer." Thus *Gerba*

was filed almost five months after the event which the plaintiff's complaint disclosed was the alleged breach of the duty of fair representation. That period is similar to the five month lapse in *Local 1020*. The defendants in *Gerba* raised the statute of limitations issue on a motion to dismiss under Fed. R. Civ. P. 12(b), which I granted with leave to re-file. I noted that even though *Local 1020* was the subject of a petition for rehearing and rehearing *en banc*, the *Gerba* complaint would be untimely even with the 90 day limit of 9 U.S.C. § 1 *et seq.* While *Gerba* was under advisement, the Ninth Circuit denied the petitions for rehearing in *Local 1020*.

After *Gerba*, Judge Leavy ruled in *Dreher v. Crown Zellerbach*, Civ. No. 80-185 (dec. filed Jan. 6, 1982). There, the employee was discharged on August 7, 1978. He alleged that the discharge was wrongful and on February 20, 1979, more than six months later, filed his grievance with a shop steward. Internal union procedures require the union to pursue a grievance within seven days of the discharge. The union took no action on the grievance. Approximately one year later, Dreher filed his action in federal court. The defendants argued that the latest date upon which the cause of action could have accrued was February 27, 1979, when the union failed to process the grievance. This date was some twelve months before the filing of the action.

Applying *Mitchell*, *Local 1020* and *Gerba*, Judge Leavy held the action time-barred. Judge Leavy noted a possible basis for distinguishing *Mitchell* and *Local 1020* from *Dreher*, in that in the *Dreher* case there was no formal arbitration award entered, as in *Local 1020*, and apparently no consultative labor-management discussion of the grievance, as in *Mitchell* and *Gerba*. In *Dreher*, the union's alleged breach consisted of the fact that it simply took no action at all on the grievance. Judge Leavy found this distinction unpersuasive, however:

> [Dreher] would distinguish the cited cases because each of them involved some effort by the union in a grievance or arbitration procedure. I believe the distinction is of no consequence. The only difference is in the specifics [of the alleged breach of the duty of fair representation].

Id. at 3.

I agree. The predicate to an employee's § 301 action is a demonstration that the union breached its duty of fair representation. A breach would occur when a union wrongfully refused to pursue a grievance, as well as when a union wrongfully acquiesces in a decision. Upon the occurrence of any of these events, the alleged injury to the grievant is final and the cause of action accrues. To hold otherwise would mean that there would be *no* accrual date, and *no* statute of limitations for an alleged wrong suffered when a union did not pursue a grievance. This would not be in accord with *Mitchell.*

There are, however, recognized doctrines which will toll the running of the statute of limitations under certain circumstances. If the union or its employees, or the employer itself, were to mislead the grievant into believing that the grievance was being acted upon, when in fact it was not, there would be no accrual of the action until the grievant learned the true state of affairs constituting the injury. *Waggoner v. Dallaire,* 649 F.2d 1362 (9th Cir. 1981) (For § 301 claims, state statute of limitations tolled by fraudulent concealment of existence of cause of action) *see also Cline v. Brusett,* 661 F.2d 108, 110 (9th Cir. 1981) (Cause of action accrues when party knows or has reason to know of the injury which is the basis of the action).

With these precedents in mind I reach the present cases. *McNaughton* concerns a situation in which an employee was discharged on December 12, 1980, for alleged sexual harassment of another employee. The union

represented the grievant through the early stages of the grievance procedure. McNaughton's complaint alleges that after January 16, 1981, the union arbitrarily and in bad faith refused to pursue the grievance. The complaint in federal court was filed some nine months later, on October 20, 1981. Judge Juba, on the motion of the defendants under Fed. R. Civ. P. 12(b), dismissed the complaint in light of *Mitchell*, *Local 1020*, and my decision in *Gerba*.

Judge Juba was correct. The plaintiff raises the objection that, in essence, the Ninth Circuit's application of the 20 day period should not apply here because the union abandoned the grievance before it reached the stage of formal arbitration. I disagree. The rationale of the *Mitchell* decision, as applied by *Local 1020* applies to discharge grievances regardless of the stage at which the union's alleged breach of its duty occurs. The purpose of *Mitchell* is to protect the grievance machinery from a belated attack in federal court, which would tend to undermine its effectiveness as the swift instrument for the resolution of industrial disputes.

McNaughton disputes the date of January 16, 1981 for the accrual date of his cause of action. It is possible that the plaintiff can amend the complaint to allege that he did not know of, nor have reason to know of, the union's failure to proceed, until a date twenty days prior to the date on which the complaint was filed. I will therefore order this action dismissed, with leave to re-file within thirty days. If there is no re-filing within thirty days, this dismissal shall be with prejudice.

In *Gerba*, I took the same action I now take in *McNaughton*, by dismissing the case with leave to re-file. An amended complaint has been filed in *Gerba*, supported by an affidavit by the plaintiff, which states that he first became aware of the union's denial of his grievance on or about October 1, 1981, and filed this action within twenty days. The defendant union has renewed its motion to

dismiss, supported by an affidavit which seeks to contradict the affidavit of Gerba as to his knowledge of the facts constituting the alleged breach. Since I consider material outside the pleadings, I treat this motion as one for summary judgment under Fed. R. Civ. P. 56.

The sworn statement of the plaintiff in his affidavit, to the effect that he did not know the outcome of his grievance until October 1981, is sufficient to withstand a summary judgment motion on the limitations issue. Although the affidavit of a union official contradicts that of the plaintiff, I cannot resolve such a question of fact on a summary judgment motion. Nor can I say that Gerba "should have known" of the grievance outcome, and is chargeable with that knowledge as a matter of law.

I recognize that it will be difficult for defendants to assert the bar of the statute of limitations unless they have provided unequivocal notice to a plaintiff, in writing. However, such a notice provision would not impose an unreasonable burden upon either the union or the employer. I note that ORS 33.310, the twenty day Oregon statute of limitations which the Ninth Circuit endorsed for § 301 actions in Oregon, does not run until the losing party receives actual written notice of the adverse decision of an arbitrator. I do not hold that written notice is necessary, but merely point out that it is certainly effective.

Dated this 16th day of March, 1982.

/s/ James A. Redden
JAMES A. REDDEN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 81-972

TOM J. MCNAUGHTON,

Plaintiff,

v.

DILLINGHAM CORPORATION, an Hawaii corporation, doing business as Dillingham Ship Repair, Portland, Oregon; and LOCAL #1020 of the UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,

Defendants.

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ORDER

[Filed Mar. 16, 1982]

REDDEN, Judge:

I approve of the Findings and Recommendations of Judge Juba. This action is ordered DISMISSED, with leave to re-file within thirty days, if the plaintiff can plead a cause of action falling within the bar of the statute of limitations. If there is no re-filing within thirty days, this dismissal shall be with prejudice.

Dated this 16th day of March, 1982.

/s/ James A. Redden
JAMES A. REDDEN
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 81-972

TOM J. MCNAUGHTON,
Plaintiff,

v.

DILLINGHAM CORPORATION, an Hawaiian corporation, doing business as Dillingham Ship Repair, Portland, Oregon; and LOCAL #1020 of the UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,
Defendants.

FINDINGS AND RECOMMENDATION

This action is brought under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, against an employer for wrongful discharge in breach of a collective bargaining agreement and against a labor union for breach of its duty of fair representation. The defendants now move to dismiss on the grounds that the action was not timely filed within the applicable statute of limitations.

The plaintiff was discharged on December 12, 1980 for allegedly sexually harassing another employee. The defendant union represented plaintiff through grievance procedures pursuant to the collective bargaining agreement. On January 16, 1981, the defendant employer upheld the termination in the early stages of the grievance procedure. After this, the union declined to further represent the plaintiff in the procedures which, according to

the collective bargaining agreement, were to culminate in binding arbitration. There is no dispute that the accrual date for this action is January 16, 1981. The complaint was filed nine months later on October 20, 1981.

This court is now asked to determine the statute of limitations applicable to this action. Several possibilities are urged by the parties.

Since there is no statute of limitations governing actions brought under § 301 of the Labor Management Relations Act, the timeliness of the action "is to be determined, as a matter of federal law, by reference to the appropriate state statute of limitations." *United Parcel Service* v. *Mitchell*, —— U.S. ——, 101 S.Ct. 1559, slip op. at 3 (1981), *quoting International Union, U.A.W.* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 704-705 (1966).

The defendants urge the court to adopt the twenty-day statute of limitations of Oregon's general commercial arbitration statute, ORS 33.310. The Ninth Circuit in *Local 1020, Etc. v. FMC Corp.*, No. 78-3212 (9th Cir., October 13, 1981), adopted this statute in § 301 actions brought after the plaintiff is unsatisfied with the result of arbitration proceedings denying relief. The reasoning is that although the action is brought under § 301, it is essentially an action to vacate a decision of an arbitrator and therefore the most appropriate state statute is ORS 33.310 since it governs action to vacate arbitration decisions.

The plaintiff argues that *Local 1020* and Oregon's arbitration statute of limitations do not apply to the present case because no arbitration award has been entered. Because the union abandoned the plaintiff's cause in the early stages of the grievance procedure, no final arbitration occurred. On December 21, 1981, Judge Redden dismissed a very similar action on the grounds that the complaint was not timely filed. *Gerba v. Oregon Steel Mills, et al.*, No. 81-985 (D.Or., filed October 23, 1981). Judge

Redden applied the twenty-day limit of ORS 33.310 to the action, citing *Local 1020*, even though in *Gerba*, as in the present case, no final arbitration proceeding occurred. This decision is controlling.

The action should be dismissed because it is time-barred by the applicable statute of limitations, ORS 33.310.

Dated this 12th day of Jan. 1982.

/s/ George E. Juba
United States Magistrate

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No. 83-1739

In the Supreme Court of the United States

OCTOBER TERM, 1983

LOCAL UNION NO. 1020,
UNITED BROTHERHOOD OF CARPENTERS &
JOINERS OF AMERICA, AFL-CIO,
Petitioner,

v.

TOM J. MCNAUGHTON AND
DILLINGHAM CORPORATION,
Respondents.

RESPONSE OF RESPONDENT DILLINGHAM CORPORATION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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RESPONSE OF RESPONDENT DILLINGHAM CORPORATION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ARGUMENT

The Union seeks a writ of certiorari because the Ninth Circuit has declined to apply DelCostello v. Teamsters, ____ U.S. ____, 103 S.Ct. 2281 (1983), retroactively. The Ninth Circuit held that the two-year Oregon tort statute was applicable to the

employee's suit against the Union, essentially on a theory of malpractice. Because the employee's suit was filed more than six months, but less than two years, after the Union's refusal to process his grievance, the Union argues that the six-month period adopted in DelCostello should be applied retroactively so as to bar the employee's claim.

This Court denied the petition for writ of certiorari in a virtually identical case last term. Teamsters Local Union No. 36 v. Edwards, 719 F.2d 1036 (9th Cir. 1983), cert. denied, 104 S.Ct. 1599 (March 19, 1984). The Edwards case arose in California. The Ninth Circuit decided that the three-year California statute governing liabilities created by statute was the appropriate statute to govern the

employee's claim against his union for breach of the duty of fair representation. The Ninth Circuit refused to apply the six-month period of DelCostello retroactively so as to bar Mr. Edwards' suit against his union. The union sought a writ of certiorari, and this Court denied the union's petition.

The Union in the present case quotes heavily from this Court's decision in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), and argues that the Chevron factors favor retroactivity. However, separating the Chevron factors and microscopically analyzing each does not necessarily advance the search for the proper conclusion. As the Court of Appeals for the First Circuit recently observed in Simpson v. Director, 681 F.2d 81 (1st Cir. 1982), the three

prongs of the Chevron case are not discrete tests but instead are three perspectives on one test, "the central question of retroactivity: was reliance on a contrary rule so justified and the frustration of expectation to detrimental as to require deviation from the traditional presumption of retroactivity?" 681 F.2d at 85.

Certainly there is a strong presumption of retroactivity in the federal courts. Yet, equally certainly, this Court has recognized repeatedly that

> "where a decision of this Court could produce substantial and equitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of non-retroactivity." Chevron Oil v. Huson, supra at 106-107.

As to the suit against the Employer, we believe that the various

opinions in United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981), put Mr. McNaughton on constructive notice that the policy of rapid resolution of labor disputes would require application of a short limitation period. In Oregon, the choice was either twenty days (the State statute governing vacation of arbitration awards) or six months. Both could be respectably argued for based on the opinions in Mitchell. Nothing longer could be reasonably argued for after Mitchell, since the only other choice as against the Employer would have been a six-year statute, a period which had been explicitly rejected by this Court in Mitchell:

> "This system [the collective bargaining system] with its heavy emphasis on grievance, arbitration, and the 'law of the shop,' could easily become unworkable if

> a decision which has given 'meaning and content' to the terms of an agreement, and even affected subsequent modifications of the agreement, could suddenly be called into question as much as six years later." 101 S.Ct. at 1563-1564.

As to the suit against the Union, however, we believe that Mr. McNaughton can make a strong case for detrimental reliance. The Ninth Circuit had previously characterized fair representation claims in California as liabilities created by statute, with a three-year limitation period. Price v. Southern Pacific Transportation Co., 586 F.2d 750 (9th Cir. 1978). Justice Stevens had, in Mitchell, expressed the view that the claim against the Union was akin to a claim of malpractice. In Oregon, malpractice claims must be brought within two years. In Auto Workers v. Hoosier Cardinal, 383 U.S.

696 (1966), and in Mitchell, the court emphasized that the usual procedure would be to look to state law for the appropriate analogy. While Justice Stewart argued for the six-month period of the National Labor Relations Act, his views raised an issue which was not actually before the court.

As the Ninth Circuit recognized in Edwards, "retroactive application of a shorter statute of limitations than that pertaining when the case was filed is inherently unfair." 719 F.2d at 1040. It would seem that Mr. McNaughton could reasonably have relied on Hoosier Cardinal, Mitchell and Price to believe that he should look to the most appropriate state statute of limitations. As to the claim against the Union, Mr. McNaughton could reasonably have concluded that

the applicable period was two years, the period which the Ninth Circuit chose. Application of DelCostello retroactively would deprive Mr. McNaughton of a remedy, even though he filed his suit only some nine months after his claim accrued.

CONCLUSION

For the foregoing reasons, respondent Dillingham Corporation believes that the decision of the Court of Appeals for the Ninth Circuit is correct and should not be disturbed.

Respectfully submitted,

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TOM J. MCNAUGHTON AND DILLINGHAM CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM[1]

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1. Since the petition for certiorari was filed, the First and Second Circuits have joined five others (*see* Pet. 6) holding that the rule of decision of *DelCostello* v. *Teamsters*, —— U.S. ——, 103 S.Ct. 2281, governs suits which were pending on the date that it was decided. *Graves* v. *Smith's Transfer Corp.*, 736 F.2d 819 (C.A. 1) and *Welyczo* v. *U.S. Air, Inc.*, 733 F.2d 239 (C.A. 2).[2] The decision of the Ninth Circuit of which review

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[1] Throughout this memorandum, "Pet." will refer to the petition for certiorari herein; "Resp. Br." will refer to the Response of respondent, Dillingham Corporation.

[2] In *Graves*, the court expressed the view that the Sixth Circuit agrees with the Ninth, 736 F.2d at 822. This is incorrect; the Sixth Circuit cases discussed in *Graves, id.*, antedate *DelCostello*. See also Pet. 7, n.2.

is sought herein is, therefore, in conflict with that of each of the seven other circuits which have squarely confronted the issue of the "retroactivity" of *DelCostello*.

The fact that a majority of all the Circuits has now taken the opposing position to that of the court below appears to be more pertinent in determining the merits of the petition than the fact, noted by the respondent-employer (Resp. Br. 2-3), that this Court declined to review a prior Ninth Circuit case raising the same issue.

2. As we stressed in the petition (Pet. 7, 11-12) this case is an especially appropriate vehicle for considering whether the *DelCostello* rule is to be given effect in pending cases because the decision below undermines the policy enunciated in *DelCostello* that in a hybrid § 301/fair representation suit the same statute of limitations should apply to the claim against the employer as to the claim against the union. Added force is given to the point by the respondent-employer's decision to oppose certiorari and to defend the Ninth Circuit decision which applies a twenty-day statute of limitations to the suit against the employer and a two-year statute to the suit against the union (Resp. Br. 4-8). The employer thus makes common cause with the plaintiff to retain the union's potential liability, although it was the employer's decision to discharge him which caused the only damage against which the plaintiff complains.[3] Under these circumstances the union can expect little cooperation from the employer at trial when, as the lone remaining defendant, it seeks to sustain the reasonableness of that discharge, and its decision not to prosecute the grievance. Moreover, while the employer defends the equity of this result, it fails to address the point made in the petition (p. 13) that if the plaintiff had brought his action within six months, the claim would have been timely against *both* defendants under *DelCostello*.

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[3] The complaint does not allege that the union harmed plaintiff except by failing to process his grievance against the discharge, with the result that it was not arbitrated. See Pet. 4-5.

On the merits, the employer does not attempt to defend the Ninth Circuit's application of the *Chevron* factors. Rather it seeks to evade a *Chevron* analysis, stating that "separating the *Chevron* factors and microscopically analyzing each does not necessarily advance the search for the proper conclusion." (Resp. Br. 3). We agree fully with the statement in *Simpson v. Director*, 681 F.2d 81, 85 (C.A. 1) quoted at Resp. Br. 4, but respondent misunderstands its meaning. The *Simpson* court did not disavow the *Chevron* factors; it engaged in a meticulous analysis of the retroactivity problem before it in light of those factors, 681 F.2d at 86-90. The court concluded that "when the situation is analyzed in light of *Chevron Oil's* three factors, we are not persuaded that [the case whose retroactivity was at issue] was decided in the face om such widespread justifiable reliance [on prior contrary law] as to overcome *the general presumption of retroactivity.*" (*Id.* at 90, emphasis added). The same is true here, see Pet. 9-10. As *DelCostello* explained, the Court there did not overrule any prior precedent or make a "clear break" with prior decisions. Because the prior law did not create the justifiable reliance which is a prerequisite to nonretroactivity, summary reversal may be appropriate.

CONCLUSION

For the reasons stated in the Petition for Writ of Certiorari and herein, the Petition should be granted.

Respectfully submitted,

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